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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE, FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, City of Niceville, Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Eleventh Circuit Court of Appeals entered in this case on September 12, 1990, and that court's denial of petitioner's motion for rehearing on November 16, 1990. The opinion is reported at 911 F.2d 634, and is reproduced at Petition App. 1a-19a.

STATEMENT OF THE CASE

This is one of three lawsuits involving the efforts of Warner Cable Communications Inc. seeking judicial intervention to prevent the City of Niceville from financing, constructing and operating a municipally-owned cable television system in competition with Warner's system in Niceville.[1] Although the City declared its intention to enter into the cable television business in late 1985, apparently provoking this litigation, the City has not yet obtained financing for such a system and has not begun construction of it. While the City has authorized the sale of revenue bonds in the amount of $2 million, has retained consultants, and has taken a variety of other steps toward planning a system, the record also discloses that there is presently no municipally-owned system in Niceville.

Warner asserts that the City's purpose is to achieve the complete elimination of Warner's operation in Niceville, but the record discloses that there were several circumstances leading to the five-member City Council's determination in September 1985 to enter into the cable television business. One factor was the Council's knowledge that the bordering city of Valparaiso, Florida, has, for many years, successfully owned and operated its own cable television system free from the type of technical

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[1] The instant case was the first lawsuit brought by Warner against Niceville. Warner intervened in opposition in a proceeding filed in a state court by Niceville to validate the issuance of revenue bonds for financing the construction of Niceville's cable television system. The Florida Supreme Court's opinion affirming the validation of the bonds and finding that Niceville's project served a valid public purpose under Florida law is reported as *Warner Cable Communications Inc. v. City of Niceville*, 520 So.2d 245 (Fla. 1988), *cert. denied*, 488 U.S. 825 (1988). The third lawsuit was filed by Warner against the City of Niceville in the Florida state court alleging, in a 17-count complaint, a wide variety of reasons why the City should be enjoined from proceeding further. A Florida appellate opinion in this case is reported as *Byrd v. City of Niceville*, 541 So.2d 696 (1st DCA Fla. 1989), and the case is presently pending further review before that court.

problems and consumer complaints which have plagued Warner. The Valparaiso system operates at a significantly lower cost to subscribers than does Warner's system in Niceville.[2] In addition, the neighboring Valparaiso municipally-owned system provides customers with a bi-directional function that permits subscribers to utilize their cable system for burglary, fire, and medical alert monitoring at an extremely low cost.

Another factor prompting the Council to consider a municipally-owned system has been the very vocal demand from the citizens of Niceville upon their elected officials to have such a system. This demand has been expressed in several ways. Each of the five members of the Niceville City Council individually and collectively as a Council received a large volume of constituent complaints regarding the quality of Warner's service (frequent interruption of programming, nonresponsiveness to customer complaints, and problems with the extension of service to new residences in Niceville) and Warner's frequent rate increases. In addition to the constituent complaints voiced to Council members, the City Council on two occasions conducted organized opinion polls of the City's residents, and the results showed strong public demand for an alternative system.[3]

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[2] Warner's general manager freely conceded his understanding of Niceville customer dissatisfaction, driven in part by the knowledge that neighbors in Valparaiso received more programming at a lower cost. He candidly remarked that, "If I was a customer out there and, I was paying Warner $10 for 11 channels and saw somebody in Valparaiso getting 20-plus for $7, I would not be happy either." App. 4a-5a.

[3] In March 1984, four years after the City Council approved renewal of Warner's franchise, the Council conducted a questionnaire survey of its citizens regarding the desirability of an alternate cable television system. Of the 1,397 residents responding to the survey, 1,157 or 83% favored an alternate cable television system. Again in July 1985, the City Council placed on the municipal election ballot a "straw vote" question of whether voters favored the con-

Another significant factor contributing to the Council's interest in constructing and operating a city-owned, competitive cable television system was Congress' enactment of the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, et seq. In February 1985, the Niceville City Attorney advised the City Council of the passage of the 1984 Cable Act, containing a provision specifically authorizing municipal ownership of a cable system, and requiring the establishment of an entity independent of the governing body for purposes of exercising editorial control over the programming content of such a system.[4]

Thus, despite Warner's suggestion that the Niceville City Council was motivated by Warner's elimination of religious programming, the record discloses, and three courts have agreed, that the wave of citizen complaints, the votes of the electorate, and the 1984 Cable Act together constituted the driving force behind the City Coun-

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struction and operation of a city-owned system. In that election, 1,202 persons voted in favor of such a system and 106 persons voted against it.

[4] 47 U.S.C. § 533(e) provides:

> (1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.
>
> (2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.

The City of Niceville passed an ordinance providing for the appointment of an independent entity to exercise programming decisions and make program selections for a Niceville cable system. Warner challenged the City's authority to do so in the instant case, and both courts below specifically found that the ordinance fully complied with the requirements of the Cable Act. *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d at 643-644; Petition App. 19a, 51a.

cil's September 1985 decision to enter into competition with Warner.[5]

Niceville's intention in constructing and operating its own competitive system was not simply to provide greater programming availability, greater locally-generated governmental, educational, and public interest programming, and a lower subscription cost than that being offered by Warner; it was also to utilize a municipal cable system for non-entertainment purposes. After the system is constructed and operational, Niceville's intention is to utilize the two-way capability of the system in much the same manner as the adjacent community of Valparaiso. Utilizing this capability, Niceville would be able to provide police, fire, and medical alert communications for its citi-

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[5] Throughout its petition, Warner strives to create the impression that the Niceville City Council was motivated by Warner's decision to drop the Jim and Tammy Bakker show and to make programming decisions in New York City. Petition 5, 9, 19, 21-23, and 24. Warner points to a fragment from the record as a pivotal fact, utterly ignored by the courts below, yet demonstrating Niceville's "evidence of censorial intent." The record itself, however, establishes the contrary. At a Council meeting in April 1982, some three and one-half years before the City determined to enter into competition wtih Warner, the City Manager reported to the Council that he had received a large volume of citizen complaints over Warner's then-recent decision to drop the PTL network (including the Jim and Tammy Bakker show) from its program lineup. At that meeting, the Council directed the Mayor to send a letter to Warner's local manager pointing out the receipt of some customer discontent, and suggesting that Warner reconsider its programming decision. Warner asked each of the Council members about their recollection of that event when their depositions were taken four years later in 1986. As reflected in Petition App. 76a, 80a-81a, 82a, and 87a, two Council members and two City staff officials responded, with varying degrees of recollection, that they did recall receiving complaints from Niceville citizens on those subjects and that the matter was resolved at that time. The trial court (at Petition App. 37a), the Court of Appeals (at Petition App. 2a-3a), and the Florida Court of Appeal have all found that the City Council was motivated by citizen complaints, the citizen votes which were taken, and the authority of the federal Cable Act. *Byrd v. City of Niceville*, 541 So.2d 696, 697 (1st DCA Fla. 1989).

zens.[6] The record below contains undisputed facts, referenced by the trial court in its opinion,[7] indicating that Warner's potential demise in the face of competition would not at all be the certainty which it predicts in its petition. For many years, Warner was the only cable operator in the nearby resort community of Sandestin, with approximately 1,000 customers on its system. In 1984, a second competing franchise was awarded to another company at Sandestin, which attracted 700 to 800 of Warner's customers. App. 1a-2a. Not only has Warner continued to supply cable service to the Sandestin resort after having lost approximately 80% of its customer base, it even went forward in rebuilding and upgrading its system in the face of that competition, and Warner has no plans to shut the system down. App. 2a.

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[6] Ironically, it was Warner which invented cable's bi-directional capability in the 1970's. Warner's general manager testified that this technology was marketed and utilized by Warner in Cincinnati, Houston, Dallas, Pittsburgh, and Columbus, Ohio. App. 3a. However, Warner had made a corporate decision that this use of a cable system did not produce what Warner considered to be a sufficient revenue stream, and it did not produce a profit. Accordingly, Warner abandoned that capability of cable television and has not made it available in Niceville. App. 3a-4a.

[7] In its order dismissing Warner's First Amendment claim on summary judgment, the district court found:

> . . . Since 1984, Warner has been operating in competition with another private system at the Sandestin Resort. Although Warner has lost 70% of its customers in that system, it has continued its Sandestin operations.
>
> . . .
>
> Furthermore, the outcome of a competition between Warner and the City will depend on what actions Warner takes in the future. Presumably, as the record indicates it has done in similar situations, Warner will attempt to compete with the City system. What effect this will have on the market is simply not capable of determination at this point. Even if there was evidence establishing that only one system can survive in Niceville, it cannot be said now that Warner will inevitably lose.

Petition App. 36a, 42a.

The courts below have correctly found that Niceville's intention was simply to construct a municipally-owned cable television system which would operate in competition with Warner.[8] The proposed Niceville system would offer a greater program selection than that available on Warner's system, would offer life and property protection services not available on Warner's system, would have its programming locally determined by an independent entity established in accordance with the Cable Communications Policy Act of 1984, and would do all of this at a cost lower than that presently charged by Warner to its Niceville customers. The City's intention is to have its own cable system financed through a bond issue,[9] to be repaid by the revenues of the system itself, with any unexpected revenue shortfalls being covered by two additional sources of non-ad valorem revenues authorized and provided for by Florida law.[10] Apart from this rather

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[8] In its order and memorandum opinion of March 10, 1989, the trial court stated:

> In adopting this ordinance, the City implemented its decision to compete with the plaintiff in the Niceville cable television market with a city-owned cable system.

Petition App. 20a. The Court of Appeals agreed that head-to-head competition is all that Niceville intends. 911 F.2d at 638; Petition App. 3a, 7a, 8a-9a.

[9] Warner states that the revenue bonds "will be sold to Niceville residents," who would then have a "powerful economic incentive" to sign on with the City's system. Petition 20. Although certainly no Niceville resident would be precluded from purchasing such bonds when they are issued, there is no evidence in the record giving substance to Warner's implication that the bonds will be purchased exclusively by Niceville residents, or that there is any requirement for residents to purchase bonds. The record shows that the City has engaged a financial agent whose intention is to market the bonds in established, national markets.

[10] The bond ordinance's secondary pledge of revenues, in the event that the cable system revenues are insufficient to retire the bonds, consists of the City's half-cent sales tax and its proportional share of the state's guaranteed entitlement of federal revenue sharing funds provided by Florida law. Petition App. 72a-74a.

traditional financing structure, the record is absolutely devoid of any evidence of an intention on Niceville's part to engage in what Warner refers to in its petition as "predatory economic competition." Petition 13.

In its petition, Warner attempts to construct an argument regarding Niceville's intent based upon two selected comments of one Council member, which are repeated throughout Warner's petition.[11] The record reveals, however, that these two comments were taken completely out of context and were not uttered in any relationship to the subject for which Warner has quoted them.[12] Ironi-

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[11] Warner references a comment of Councilman Gary Brown made at a February 18, 1985, meeting of the Niceville City Council. Mr. Brown is quoted as having stated, "There is not gonna' be a competitive system in Niceville." This comment is referenced in Warner's petition for the purpose of portraying a threatened prediction that Warner will not survive competition with a city-owned system. Petition 3, 7, 9. Additionally, Warner presents a portion of Mr. Brown's trial testimony where he acknowledges that at a May 10, 1988, council meeting, he remarked that, "The big hammer of the franchise was originally the rate control; if you're controlling somebody's money you are controlling them." Petition App. 80a. This comment is referenced in an attempt to establish that Niceville continues to have rate regulatory authority over Warner—a "fact" which Niceville disputed at the trial of the due process claim and which the lower courts determined need not be resolved.

[12] Mr. Brown's February 1985 comment stating that he did not feel that there would be competition is actually a reference to his views regarding competition between Warner and Cosmic Communications, Inc. The City Council had granted a second franchise to Cosmic five months earlier in October 1984. Mr. Brown explained that his concern at that particular meeting was, "We had not heard from Cosmic. We had no reason to believe that things were proceeding." App. 6a. His concern was that while a second franchise had been granted by the City to another private cable operator, there would "be no competition" in the City because the second operator had shown no signs of utilizing its franchise.

The second comment of Mr. Brown's, referencing municipal control of a franchise holder through the "big hammer" of rate regulation, was a statement made by him at a Council meeting on May

cally, the one Council member whom Warner quotes out of context in its petition is the very Council member referred to by the Eleventh Circuit Court of Appeals as having articulated an awareness on the part of the City Council to "maintain a level playing field" in which Warner and the City can compete. 911 F.2d at 642; Petition App. 16a.

In an attempt to conjure up a content-based, suppressive intent on the part of Niceville, Warner is taking a very different position from that which it has taken in the lower courts. The First Amendment issue was decided by the trial court on motion for summary judgment after an extensive record of facts had been filed with that court.[13] In submitting its brief in opposition to Niceville's motion for summary judgment, Warner simply argued that the only "dispute" before the court centered upon whether Warner would be economically forced to cease operation in the years following commencement of a city-owned system. In the extensive briefs filed with the trial court, Warner made not one mention of any reference to religious programming, the Jim and Tammy

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10, 1988, one week before trial of the due process issue in the trial court. The reference contained in Warner's Appendix is an excerpt of trial testimony where Mr. Brown acknowledges his remark of a week earlier. The very text of the quote, stating, "The big hammer of the franchise was originally rate control," is an obvious reference to the rate regulatory authority which Niceville possessed prior to the enactment of the Cable Communications Policy Act of 1984. The City has consistently taken the position throughout this case that it cannot regulate Warner's rates. Indeed, the trial court's opinion rendered after trial on the merits of the due process issue notes that, "City Councilman Gary Brown testified that, according to the information provided to him by the City's attorneys and its cable consultant, the City could not control the rates of Warner." Petition App. 25a-26a.

[13] The Court of Appeals noted that, "After extensive discovery and submission of voluminous factual materials to the district court, both parties moved for summary judgment." 911 F.2d at 636; Petition App. 4a.

Bakker show, or the quotes from Council member Brown which it parades throughout its petition in this Court as "evidence of censorial intent." Since the only dispute before the trial court on motion for summary judgment centered upon future occurrences, the trial court reasoned that these events were simply too speculative to permit adjudication. Accordingly, the court dismissed the First Amendment issue on grounds of justiciability. Petition App. 35a-45a.

Similarly, in its briefs to the Eleventh Circuit, Warner urged that the First Amendment issue was ripe for adjudication because it wanted to litigate at trial whether the city of Niceville constituted a "natural monopoly" and whether it would be forced out of business.[14] Again, Warner made no mention of the City Council's action in 1982 to forward a letter relating constituent complaints concerning program changes, or the quotes from a Council member which it is presently using in its petition to imply a municipal intent to do something more than compete with Warner.[15] Accordingly, reviewing the record before it, the court of appeals determined that even if

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[14] The Court of Appeals noted the lack of any evidence of suppressive intent:

> Warner implicitedly recognizes that Ordinance 58[3] does not target the content of Warner's speech and that the City does not have to meet the heavy burden of demonstrating a compelling governmental reason to support its action.

911 F.2d at 637, n.4; Petition App. 5a, n.4.

[15] In its initial Brief on Appeal, Warner did quote Councilman Gary Brown as stating, "I would have to fight for the [City's] system if that's what you're asking," quoting a portion of Mr. Brown's testimony to the court at the trial of the due process issue. App. 7a. Of course, Warner has abandoned the due process issue in this case, with both lower courts having found as fact that there was no evidence of any action or intention on the part of the City of Niceville to interfere with Warner's operation of its system in Niceville.

Warner's crystal ball proved accurate and that, over the course of time and competition, Warner were to make an economic decision to terminate its Niceville system, Warner would not have been deprived of its First Amendment rights.

The record of facts before the Court therefore presents a clear picture of a small community whose residents collectively have, for undoubtedly a variety of reasons, become intensely dissatisfied with their existing cable television operator. They have appealed to their elected officials to take action and provide them with an alternative cable system. The elected body made a determination to take that action and establish a municipally-owned system only after it had informed itself from independent consultants that such a system could be an economically viable venture, and could operate in active competition if only a portion of Warner's customer base could be attracted. The Council also determined that such a system could be utilized to provide its citizenry with a variety of life and property protection services which are currently being provided in an adjacent city. As both of the courts below have recognized, the purpose of Niceville has simply been to compete with Warner and to provide its citizens with an alternative which they have long demanded.

REASONS FOR DENYING THE PETITION

The operative facts and the opinion below establish that Niceville's contemplated action does not implicate Warner's First Amendment rights and, indeed, will foster the rights of listeners which lie at the heart of the First Amendment. In addition, as Warner is seeking a flat prohibition on a franchising authority's statutory right to enter the cable television business whenever there is an established private operator, Warner is in reality requesting this Court to judicially amend the Cable Communications Policy Act of 1984, by creating an exception which

Congress itself has rejected. Since head-to-head competition in the cable industry is only now beginning to expand with the approval of Congress and at the encouragement of the Federal Communications Commission, this case does not present an appropriate framework to explore the economic forces at work in the cable marketplace with a view toward further defining the contours of constitutional law in that industry.

I. NICEVILLE'S DECISION TO OWN AND OPERATE A CABLE TELEVISION SYSTEM DOES NOT IMPLICATE WARNER'S FIRST AMENDMENT RIGHTS.

Throughout this litigation, Niceville has never contested the proposition that Warner enjoys and is entitled to protection of its full panoply of First Amendment rights. As this Court has noted in several cases coming before it, cable television operators are engaged in First Amendment activities as they provide programming, whether retransmitted from signals generated elsewhere or locally originated.[16] Although cable operators are, in many respects, comprehensively regulated through the provisions of the Cable Communications Policy Act of 1984 and implementing regulations promulgated by the Federal Communications Commission, they are quintessential "speakers" in any community in which they operate. As one of the nation's largest multiple system operators, Warner has fully exercised its First Amendment rights in the City of Niceville, unimpeded by any City action.[17] Warner

[16] The most recent opinion is *Leathers v. Medlock*, —— U.S. ——, 59 LW 4281 (1991), where the Court recognized once again that cable operators are engaged in activities protected by the First Amendment, but held that the tax scheme involved in that case did not implicate those constitutional rights.

[17] In deciding Warner's due process claim, both courts below reviewed the extensive record of facts and concluded that Niceville had not taken any action adverse to Warner and is not presently threatening to do so.

has, in its sole discretion, determined the level of service which it provides, selected the programming which it delivers, and provided locally-generated programming. Warner's franchise was renewed in 1980, and despite a misstatement in its petition,[18] Warner will enjoy the renewal process guaranteed to it by the Cable Act.[19] If and when a Niceville-owned system becomes operational, Warner will continue to enjoy all of its rights under the franchise.[20] It will continue to be able to determine the programming it chooses to provide to its customers, and it will continue to have a free hand in generating its own programming in Niceville. As the lower courts in the instant case have concluded, Warner's rights to speak will continue unabated unless it determines for itself that it no longer chooses to deliver electrical signals through its cables in the City of Niceville. Although competition between the two systems will certainly occur if Niceville is able to finance, construct, and operate a city-owned system, the record is devoid of any indication that the City has targeted Warner "in a purposeful attempt to interfere with its First Amendment activities," or seeks to suppress "particular ideas." *Leathers v. Medlock*, —— U.S. ——, 59 LW 4281, 4283 and 4285 (1991). Based upon these facts, the opinion of the court below is fully consistent with the treatment of First Amendment rights of broadcast and cable speakers and their listeners and is fully consistent with the line of cases beginning with the seminal decision of *Red Lion Broadcasting v. FCC*,

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[18] "Finally, the city has the ultimate power over Warner—the power to refuse to renew its franchise." Petition 7.

[19] The Cable Act provides a process for franchise renewal, limits the basis for denial of renewal, and provides for judicial review of a franchising authority's adverse decision. 47 U.S.C. §§ 546, 555.

[20] Even if Niceville were to reacquire the right to regulate Warner's rates, there would be no obligation upon Niceville to exercise that right.

395 U.S. 367 (1969), concluding with the Court's recent decision in *Leathers v. Medlock, supra.*

In *Red Lion Broadcasting v. FCC, supra,* the Court repeatedly stressed that in application of First Amendment rights in the broadcasting field, it is the right of the public at large to effectively receive a maximum diversity of programming which is "paramount" and "crucial." 395 U.S. at 389-391. The Court emphasized, as well, that there is no First Amendment right on the part of a broadcaster to monopolize a particular reception market. This same approach was reiterated in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973), and *Leathers v. Medlock*, 59 LW at 4284, quoting *Cohen v. California*, 403 U.S. 15, 24 (1971). Focusing upon the intent of Congress in enacting statutory regulation of the broadcast industry, the Court has frequently been called upon to review "the long-established regulatory goals of maximization of outlets for local expression and diversification of programming," *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979), and "the federal objective of ensuring widespread availability of diverse cable services throughout the United States." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 717 (1984). Although the First Amendment value of citizens' access to diversity was not explicitly articulated in the Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), it was clearly embraced within the Court's recognition of the First Amendment rights of the petitioning cable operator who was seeking to provide a second cable market to a portion of the City of Los Angeles.

The various courts of appeals which have had occasion to review broadcast and cable competition have, drawing upon *Red Lion* and its progeny, refused to apply First Amendment principles in such a manner as to preclude listeners from receiving a diversity of programming. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S.

1001 (1982); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985).[21]

Niceville's intention is merely to compete for customers with Warner. It does not seek to influence Warner's programming decisions, Warner's distribution of services, Warner's communication with the residents of Niceville, or any other aspect of Warner's operation. The developing contours of First Amendment rights in the broadcast and cable television body of case law has, to date, established that the speaker's rights to speak do not predominate over the paramount rights of listeners and viewers to receive the widest possible range of programming. As the appellate court correctly concluded, there is presently no basis in First Amendment jurisprudence for enjoining or restricting Niceville from providing its citizens with the alternative which they have been demanding since 1985, after Congress expressly authorized the City's right to "speak" over coaxial cable.

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[21] Warner cites three appellate decisions for the broad proposition that courts in those instances have determined that "certain communities can economically support only a single cable system." Petition 17, n.15. Both *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), and *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), were decided prior to this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), and prior to passage of the Cable Communications Policy Act of 1984. Although the Court in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987), did acknowledge the trial court's finding that the city involved in that case would ultimately support only one cable operator, it also stated that this Court's then-recent decision in *Preferred Communications* "implied that 'natural monopoly' is not a justification for exclusive franchising," *id.* at 716, and it further found the existing operator's defense to a $38 million antitrust violation based upon First Amendment grounds to be a disingenuous and unsuccessful defense.

II. BOTH MUNICIPAL OWNERSHIP OF CABLE TELEVISION SYSTEMS AND DIRECT COMPETITION AMONG CABLE OPERATORS ARE AUTHORIZED AND ENCOURAGED BY CONGRESS THROUGH THE CABLE COMMUNICATIONS POLICY ACT OF 1984.

In defining and determining the application of First Amendment rights in the broadcast and telecommunications media, the Court has frequently been guided by the determinations of Congress as they are embodied in regulatory legislation, and by the judgment of the Federal Communications Commission, designated by Congress as the agency responsible for implementation of congressional policies. As the Court examines existing statutory provisions and the intent of Congress as reflected by related legislative materials, the Court will find that municipal ownership and the encouragement of competition among cable operators are statutorily authorized. The Court will further find that the legislative product is the result of Congress' balance of First Amendment values in an industry which has experienced explosive growth over recent years and is presently in a phase of technological and economic transition.

The legislative purposes underlying the Cable Communications Policy Act of 1984 were plainly set forth by Congress in the Act. Those purposes include encouraging the growth and development of cable systems, encouraging the industry to provide the widest possible diversity of information sources and services to the public, and the promotion of competition in the cable industry. 47 U.S.C. § 521. In order to assist the cable industry in achieving those objectives, Congress carefully and deliberately fashioned ownership restrictions designed to prevent established television broadcasters and telephone service operators from quickly taking control of the cable industry, 47 U.S.C. § 533(a) and (b), while at the same time prohibiting franchising authorities from denying franchises to multiple system operators like Warner. 47 U.S.C. § 533(d).

In determining the forms of ownership which it desired to prohibit and those which it sought to foster, Congress expressly decided to permit ownership of cable systems by governmental franchising authorities. 47 U.S.C. § 533(e). The legislative history of the 1984 Cable Act reveals that in crafting the language authorizing municipal ownership, Congress was fully aware that cities were considering entry into the cable television business for reasons other than lack of interest on the part of the private sector.[22] The method employed by Congress to achieve its purpose in fostering cable competition while preserving First Amendment values has been to permit ownership by a franchising authority, accompanied by a statutory restriction upon that authority's ability to exercise editorial control over the content of most forms of programming. 47 U.S.C. § 533(e)(2). Again, the legislative history of the Act reflects that Congress intended this provision to incorporate the balance struck between

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[22] The House Committee Report accompanying P.L. 98-549 stated:

> Cable ownership issues arise in three contexts: municipal ownership of a system; a city's acquisition of a system from a commercial operator in the event of a breach of the franchise or upon expiration of the franchise; and efforts to diversify the ownership of cable systems.
>
> Most cable systems are owned and operated by commercial cable interests. Municipal ownership and ownership by nonprofit entities like cooperatives have traditionally evolved in communities where private companies were not particularly interested in offering cable services because of expected low return on investment.
>
> More recently, however, a number of larger cities have taken a close look at building their own cable systems as a profitable means of making cable more responsive to city residents' needs. While proponents applaud municipal ownership as a way to meet local needs, critics raise First Amendment concerns about government control of a part of the media. These concerns are addressed in the legislation.

U.S. Code Cong. & Adm. News 1984, p. 4664.

fostering competition and preserving First Amendment interests.[23]

Clearly, in authorizing cable competition between private operators and their franchising authorities, Congress was not concerned with the economic effect of that competition upon the competing operating entities. Congress implicitly rejected the notion that cable television is a "natural monopoly." [24]

Warner's petition virtually ignores the existence of the Cable Communications Policy Act of 1984,[25] and it makes no reference to the many statutory protections which Congress now provides to cable operators.[26] Warner is,

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[23] The House Committee Report states:

> Section 613(e) enables a state or franchising authority to own a cable system, but bars the state or franchising authority from exercising any editorial control over the content of any cable service provided over that system (other than programming on any channel designated for educational or governmental use), unless the editorial control is exercised through an entity separate from the franchising authority. The Committee has included this requirement in order to preclude undue government control of programming contrary to the First Amendment.

U.S. Code Cong. & Adm. News 1984, p. 4695.

[24] In 47 U.S.C. § 556(b), Congress provided for the continuing exercise of jurisdiction over cable services on the part of states. The State of Florida has also implicitly rejected the assumption that cable television is a "natural monopoly" when it provided a statutory process for franchising authorities to follow in granting overlapping cable franchises. Florida Statute 166.046 (1989), reproduced at App. 11a-13a.

[25] The only reference to the Act appears at Petition 7.

[26] The Act guarantees the use of public property, 47 U.S.C. § 541; limits franchise fees, *id.* at § 542; limits rate regulation, *id.* at § 543; prescribes the range of services, facilities, and equipment which may be regulated, *id.* at § 544; provides for the modification of existing franchise provisions with a right of judicial review, *id.* at § 545; and provides for a right of renewal or sale at fair market value, *id.* at §§ 546-547.

in effect, requesting the Court to strike a very different balance of interests from that determined by Congress, and it urges the Court to engraft a second restriction upon municipal ownership which Congress deliberately declined to fashion. Even if the Court were persuaded that the balance struck by Congress between the interests of fostering competition while preserving First Amendment values is somehow constitutionally deficient because of the Act's failure to guarantee that private cable operators should enjoy economic success, the operative facts in this case present a poor vehicle for attempting to correct what Warner argues was Congress' mistake. This is so because, until competition commences, the effects upon speakers, listeners, or viewers cannot be determined.

III. IN THE CONTEXT OF THE PRESENT STATE OF THE CABLE TELEVISION INDUSTRY, THE ISSUES PRESENTED DO NOT MERIT REVIEW.

Niceville fully concedes that First Amendment issues require wide protection in the courts, that the denial of certiorari in the instant case will remove one obstacle from Niceville's pursuit of its stated intentions, and that all private cable operators would appreciate and argue strenuously for insulation from competition from their franchising authorities. However, considering the present state of the cable industry as a larger context in which this case has arisen, Niceville respectfully suggests that the creation of new legal principles affecting the relationship between governmental franchising authorities and private cable operators is presently unwarranted.

At the time this case was tried, Warner conceded that the facts presented a "unique" circumstance in the cable industry. App. 2a. When Congress enacted the 1984 Cable Act, it was aware that existing municipal ownership of cable systems had arisen largely as a result of lack of interest on the part of private operators. In its petition, Warner points to more recently reported data

indicating that there are some 84 communities in which a franchising authority is considering competition with a private cable operator. Petition 12, n.11. There is no indication of how many communities are considering competition as a franchise renewal negotiation tactic, how many of those communities are being driven by intense customer dissatisfaction and voter demand, nor how many communities have reached the point that Niceville has in its determination. The fact remains, however, that there are very few communities which have determined to undertake the financial risk of competition, and this is the first such case arising after the 1984 Cable Act which has obtained appellate review. Apart from the assumed interest of most all private cable operators in obtaining an answer to the questions presented by Warner in its petition, this case, standing alone, presents only a single instance of municipal intention, driven by customer dissatisfaction and voter demand. The wide range of other interests and purposes which may now or in the future motivate other franchising authorities to compete with private operators is simply not before the Court. For example, other franchising authorities may be using the prospect of competition to extract franchise concessions from a private operator which would otherwise be prohibited by the 1984 Cable Act, or which a private operator would otherwise simply be unwilling to provide. A franchising authority may have as its purpose the operation of a new public enterprise, intended to produce a new source of municipal revenues. To the extent that a franchising authority's purpose or motivation, or the means which it selects to implement a competitive system, would be viewed by the Court as significant factors to be evaluated, this case provides an extremely limited opportunity for such review.

In enacting the Cable Communications Policy Act of 1984, Congress proceeded with deliberate caution, preferring to adopt a "wait and see" approach before engaging in further legislative adjustment of the industry.

Congress directed the Federal Communications Commission to provide a report at the end of the six-year period from the effective date of the Act. 47 U.S.C. § 543(h). The Commission was directed to report on the effect of rate deregulation on the industry and the effect of competition on the marketplace. The FCC issued its report to Congress in July 1990.[27] In its report, the Commission notes that its study has led it to conclude that the cable industry is still an evolving one. App. 8a. It urges Congress to review the progress of the cable industry and the legal framework under which it operates, App. 8a, and it also urges Congress to continue to allow competition to fluorish in lieu of reviving rate regulation. App. 8a-9a. The FCC notes that direct competition among cable operators has grown slowly, with less than 50 dual systems in operation, App. 9a, further observing that rates for cable service are significantly lower than the national average where such competition exists. App. 9a. The FCC informs Congress in its report that there are new technologies being implemented which, in combination with competitive cable systems, will likely have a significant impact on the industry over the next four to five years. App. 10a. The Commission states that, during this time, it will continue to encourage rival video providers to enter the market and invigorate the existing level of competition in the cable industry. App. 10a. Throughout the lengthy report, the Commission identifies several non-cable sources of programming competition which are presently in their infancy. These include wireless transmission of "cable" programming and direct satellite receipt of such programming. If these technologies continue to develop and gain widespread use, they are likely to supplant coaxial cable and the need for easements on public property altogether. Congress is presently considering the FCC report and proposed amend-

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[27] FCC Report *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services*, 67 Rad. Reg. 2d (P&F) 1771 (1990).

ments to the Cable Act. It is clear, as the FCC has recently found, that the industry itself is in a state of transition and Congress may well determine that it is time to legislatively alter the relationships between the participants in that industry. In this context, it is again respectfully suggested that the rule of law requested of the Court by Warner in its petition would be both premature and unwarranted.

CONCLUSION

Wherefore, for the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May —, 1991

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APPENDIX

SELECTED PORTIONS OF THE RECORD BELOW

TESTIMONY OF HARRY F. SHERAW LOCAL GENERAL MANAGER OF WARNER CABLE COMMUNICATIONS INC.

Q. As you provide service to Sandestin, do you have any competition at Sandestin?

A. Yes, we do.

Q. Who is that competition with?

A. Currently Essex, previously Skycomm.

Q. Is it a situation where both companies are offering cable services to the resort?

A. Yes.

Q. Do you have dual lines running in?

A. In some areas yes; in some areas no.

Q. What kind of areas would you have dual line, the outlying residential complex or the high-rise?

A. Probably it's easier to answer the reverse of that. Where we currently had existing lines, Skycomm overbuilt us. In some areas where they added additional new development or something like that the resort did not allow us to go forward and rewire in that area and only allowed Skycomm to wire in that area. So in some of the new development areas, at that time Skycomm was the only choice.

. . .

Q. Have you engaged in any rate competition with Skycomm or Essex to your knowledge?

A. Yes, we have.

Q. Has it developed into what you might call a rate war?

A. We have had to reduce our rates approximately 50%.

Q. Do you—how many customers do you have at Sandestin—subscribers, I guess?

A. I think in Sandestin Beach Resort, we have somewhere in the neighborhood of 200 to 300. We at one point in time had close to 1,000.

Q. Do you attribute your diminishment from 1,000 to the 200 to 300 area to competition with another supplier?

A. Yes.

. . .

Q. Does Warner presently have any plans to pull out of Sandestin?

A. No, we do not.

. . .

Q. . . . Is Sandestin part of your rebuild?

A. Yes.

Q. Has it been completed—the rebuild in Sandestin?

A. Yes.

(October 13, 1986; Dep. Tr. 50-53.)

* * * *

Q. Would you say that based on what you know and have read and have heard about in the industry, that the Niceville situation as it exists today is unique?

A. In that a municipal entity is going to overbuild a private enterprise, yes, I would say that is unique.

(October 13, 1986; Dep. Tr. 82.)

* * * *

Q. Would you also say that the Valparaiso cable system, insofar as it provides this two-way capability for home-safety purposes—and let's put aside the pumps and the wells and all of that, and the lift stations—but just in terms of home security, fire, and medical alert, that it is rare?

A. There certainly are substantially less cable operators, be they private or municipal, that are providing bi-directional two-way services.

Q. But we do know—or you do know, do you not, that the technology exists for that. Obviously it exists if Valparaiso is doing it.

A. Actually Warner Cable was the individuals who founded bi-directional systems. A gentleman by the name of Chief Scientist Jim Fischer developed it.

. . .

Q. He then was correct when he made the statement that it was Warner who developed this bi-directional technology as you've just described?

A. To my understanding, yes.

. . .

Q. Was Columbus [Ohio] like a test community for the Qube system?

A. Yes, it was.

Q. Was the Qube system ever actually used at any other locations?

A. Yes, Cincinnati, Ohio; Houston, Texas; Dallas, Texas; and Pittsburgh, Pennsylvania.

. . .

Q. What has happened with the Qube capability, vis-a-vis Warner's use of it since the late 70's?

A. The capability is still there. What I'm familiar with is what we refer to as de-Qubed—they have been de-Qubed.

Q. What do you mean by that?

A. The revenue streams did not materialize to cover the cost, and it became a subsequent hinderance. In the research and development stage of it, it became apparent —I will say to the people developing that product, because I did not look at the numbers or anything—that it was too much of an investment and too much of a monthly draw-down or cost factor involved to sustain the ongoing nature of it.

Q. Warner found that it was an expense item that wouldn't carry itself?

A. Correct.

Q. Did Warner also find that it was an expense item that couldn't make a profit?

A. My understanding is that is correct.

(October 13, 1986; Dep. Tr. 82-86.)

* * * *

Q. In the Niceville area to the extent that it has been completed, to the extent that customers have converted over, they are being offered under the new system a potential of 31 basic channels plus up to 4 premium pays. Is that right?

A. Correct.

Q. Is there any pay-per-view being offered right now?

A. No.

(October 13, 1986; Dep. Tr. 106.)

* * * *

Q. Does your upgraded system have a maximum channel capacity above which you couldn't go if you wanted to?

A. It is designed today to go to 52 channels, and in today's technology, I believe that's as far as you could go . . .

Q. And of those 52, you're currently using 35?

A. Correct.

Q. That's 17 extras that are there?

A. Correct.

(October 13, 1986; Dep. Tr. 125.)

* * * *

Q. Now, you also didn't think it was fair for people to point to their neighbors in Valparaiso, who were getting at that time more programming at a substantially lower cost. Is that the point you're trying to make?

A. I wouldn't say it's not fair. If I was a customer out there and, I was paying Warner $10 for 11 channels

and saw somebody in Valparaiso getting 20-plus for $7, I would not be happy either.

(October 13, 1986; Dep. Tr. 149.)

* * * *

Q. . . . Let me wrap up then with giving you, under April, '86, the example of an apartment where I have one outlet in my living room and one outlet in my bedroom, and I want HBO and The Movie Channel. In other words, I want everything that you offer. What do I have to pay?

. . .

A. I added $9.09 for basic; I would have added in $2 for an additional outlet, and I would have added in $12.95 for HBO, plus $12.95 for The Movie Channel, plus 50 cents for the HBO at your additional outlet. It comes up to $37.49.

(October 13, 1986; Dep. Tr. 154-155.)

* * * *

Q. Am I correct in assuming that there's more programming available from the satellites in the sky than are being offered by Warner today?

A. Yes, you are correct.

(October 13, 1986; Dep. Tr. 157.)

* * * *

Q. All right. Are your programming decisions locally made, regionally or nationally made, or some combination?

A. It's a combination. I present my views to our marketing department, to our operations department, to our engineering department. We review the expectations of what will happen, and generally based upon that input, a decision is made by the operations people in our corporate offices.

Q. Where's that located?

A. Columbus, Ohio.

(October 13, 1986; Dep. Tr. 168-169.)

TESTIMONY OF GARY BROWN
MEMBER OF NICEVILLE CITY COUNCIL

Q. Well, let's see if we can understand—as late as October 9, 1984, Cosmic had been granted the franchise. Isn't that correct?

A. Uh-huh.

Q. And was there anything else that had happened after October of 1984 and February of '85 concerning TV cable services in the City of Niceville?

A. I don't think I quite understand the question.

Q. Well, first you had only one system.

A. Uh-huh.

Q. In October you decided that there would be two private companies—

A. We still have one system.

Q. Right, but you had just granted this one very recently. In fact, it's indicated on document 111, the acceptance was not until October 22, 1984, that Cosmic had accepted it then.

A. Uh-huh.

. . .

Q. —the City's position in entering into a bond obligation for the building of TV cable?

A. We weren't discussing entering into a bond obligation. I think we asked Mr. Fray—these were simply long-term plans. There's two things I was going to mention. One thing—one answer to your question is that nothing happened. We had not heard from Cosmic. We had no reason to believe that things were proceeding. The second thing that happened in December of '85 as we talked about before, the Cable Communication Act of 1984 was passed by Congress, which specifically granted the right to cities to own their own cable system, in some cases in competition with a private operator, was the interpretation that I had received of the Act. So this was the second reason for possibility downroad, and a long-term plan of, perhaps, considering the financing of a cable television system.

(September 9, 1986; Dep. Tr. 102-103.)

EXCERPT OF BRIEF OF THE APPELLATE
WARNER CABLE COMMUNICATIONS INC. v.
CITY OF NICEVILLE
NO. 89-3273
ON APPEAL, FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

City Councilman Brown, for example, admitted at trial that if action by the City were required for the preservation of its municipally owned cable system in the competitive market, he would act as a regulator to the detriment of Warner ("I would have to fight for the [City's] system if that's what you're asking") to protect the citizens from tax increases or from reductions in municipal services.

(Brief of the Appellate, pp. 30-31.)

EXCERPTS FROM FCC REPORT, IN THE MATTER OF COMPETITION, RATE DEREGULATION AND THE COMMISSION'S POLICIES RELATING TO THE PROVISION OF CABLE TELEVISION SERVICE, JULY 31, 1990

Responding to that statutory mandate, this *Report* finds that the six years since enactment of the Cable Act—and particularly the three and one-half years since widespread rate deregulation began thereunder—have witnessed a significant and ongoing transformation of the video marketplace. The Cable Act sought cable industry growth, and the number of communities and homes served by cable has increased significantly. The Cable Act sought cable industry development, and cable has further developed its multichannel services beyond retransmission, changing the expectations of most Americans about television viewing options. The Cable Act also sought competition to cable operators, however, and the competition within the video industry is just beginning to expand and include alternative multichannel providers. Thus, the cable industry, and the newer alternative multichannel video providers beginning to compete with cable, are still evolving.

(Report, p. 5.)

* * * *

Our undertaking of this *Report* thus coincides with a growing sense, among various interested parties, subscribers and their legislators, that the time is ripe to review both the progress of the cable industry and the legal framework under which it operates.

(Report, p. 8.)

* * * *

The facts that cable operators possess varying degrees of market power does not mean that other delivery media do not compete with cable. Broadcast television and video cassette rentals provide substitute uses for some, but not all, of the services offered by cable, and

thus constrain the behavior of cable operators to some extent. Moreover the degree of competition confronting cable is expected to increase over time. Rivals such as SMATV, MMDS, home satellite dishes (HSDs), and second cable systems will probably expand their coverage, and DBS service may begin to have a significant impact in four or five years. Hence, we will focus our recommendation and actions in this area on encouraging rival multichannel video providers to enter the market and on invigorating the existing competition to cable as soon as possible.

(Report p. 33.)

* * * *

Information on current basic cable rates in markets served by more than one competing cable system is available, both in the record and in from FCC staff research. These sources indicate that, where cable systems compete head-to-head, per channel rates for basic service are generally significantly lower than the national average. . . .

(Report p. 41.)

* * * *

The number of directly competitive second cable systems is relatively small, with commentators reporting 40 to 49 directly competitive systems currently in operation. Approximately two-thirds of these systems have overlap areas of 50% or more. The relative paucity of successful competitive cable systems to date has been variously attributed to a lack of interest by cable operators (due to less attractive economics), to restrictive requirements by franchising authorities (*e.g.*, universal service requirements), and to what has been called predatory activity by incumbents as well as other advantages of incumbency. In those cases where second cable systems exist, the direct competition has resulted in reduced per channel rates for cable service.

(Report, pp. 52-53.)

* * * *

This *Report* finds that robust competition in the video marketplace has not yet developed but is emerging. In light of the developing field of existing and potential multichannel competitors to cable, and evidence that even direct competition between cable operators may increasingly occur, we do not recommend any drastic or long-term reregulation of cable rates and services. Therefore, the proposed actions and recommendations to Congress set forth in this *Report* are designed to eliminate market restraints and enhance the prospect for competition rather than to reregulate the cable industry. Consequently, they are targeted and limited and should become largely unnecessary once full-fledged multichannel competition develops.

(Report, p. 100.)

TEXT OF FLORIDA STATUTE 166.046 (1989)

166.046 Definitions; minimum standards for cable television franchises imposed upon counties and municipalities.—

(1) As used in this section, the term:

(a) "Cable service" means:

1. The one-way transmission to subscribers of video programming or other programming service; and

2. Subscriber interaction, if any, which is required for the selection of such video programming or other programming service.

(b) "Cable system" means a facility, consisting of set of closed transmission paths and associated signal generation, reception, and control equipment that is designated to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

1. A facility that services only to retransmit the television signals of one or more television broadcast stations;

2. A facility that serves only subscribers in one or more multiple-unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way;

3. A facility of a common carrier, execept that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or

4. Any facilities of any electric utility used solely for operating its electric utility systems.

(c) "Franchise" means an initial authorization or renewal thereof issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.

(d) "Franchising authority" means any governmental entity empowered by federal, state, or local law to grant a franchise.

(e) "Person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

(f) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable system.

(2) No municipality or county shall grant a franchise for cable service to a cable system within its jurisdiction without first, at a duly noticed public hearing, having considered:

(a) The economic impact upon private property within the franchise area;

(b) The public need for such franchise, if any;

(c) The capacity of public rights-of-way to accommodate the cable system;

(d) The present and future use of the public rights-of-way to be used by the cable system;

(e) The potential disruption of existing users of the public rights-of-way to be used by the cable system and the resultant inconvenience which may occur to the public;

(f) The financial ability of the franchise applicant to perform;

(g) Other societal interests as are generally considered in cable television franchising;

(h) Such other additional matters, both procedural and substantive, as the municipality or county may, in its sole discretion, determine to be relevant.

(3) No municipality or county shall grant any overlapping franchises for cable service within its jurisdiction on terms or conditions more favorable or less burdensome than those in any existing franchise within such municipality or county.

(4) The provisions of subsection (3) shall not apply when the area in which the overlapping franchise is being sought is not actually being served by any existing cable service provider holding a franchise for such area. The provisions of subsection (2) shall apply to the provisions of this subsection and subsection (5). As used in this subsection, the term "actually being served" means that cable service is actually available to subscribers to such extent that the only act remaining in order to provide cable service is the physical connection to the individual subscriber location as of 15 days prior to any subsequent application for a franchise.

(5) Nothing in this section shall be construed to prevent any municipality or county considering the approval of an additional cable service franchise in all or any part of the area of such municipality or county for imposing additional terms and conditions upon the granting of such franchise as such municipality or county shall in its sole discretion deem necessary or appropriate.

(6) All cable service franchises in existence as of October 1, 1987, shall remain in full force and effect according to their terms.